KENNETH W. BOSLEY
WESTWIND ELECTRIC, INC.

IBLA 84-146 Decided March 28, 1986
84-873

Appeals from decisions of the District Manager, California Desert District, Bureau of Land Management, holding right-of-way application for rejection and issuing final record of decision on wind energy development. CA-13973 and CA-14633.

Appeal of Kenneth W. Bosley (IBLA 84-146) dismissed; Decision affirmed and right-of-way application rejected (IBLA 84-873); Appeal of Westwind Electric Inc., (IBLA 84-873) dismissed.

1. Rights-of-Way: Applications--Rules of Practice: Appeals: Standing to Appeal

   A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

2. Federal Land Policy and Management Act of 1976:
   Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a

right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

APPEARANCES: Kenneth W. Bosley, pro se; Jerry L. Hull, Westwind Electric, Inc., for Westwind Electric, Inc.; Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On April 8, 1983, the Bureau of Land Management (BLM) published in the Federal Register (48 FR 15333 (Apr. 8, 1983)) a call for right-of-way applications for wind energy development in the Table Mountain area, California. On May 9, 1983, Kenneth W. Bosley filed right-of-way application CA-13973, pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1982), seeking the SE 1/4 sec. 27, the NE 1/4 sec. 34, and all of sec. 35, T. 17 S., R. 8 E., San Bernardino Meridian, California, for such development. The land sought by Bosley is in that portion of the Table Mountain area north of Interstate Highway 8.

By decision dated August 31, 1983, the District Manager, California Desert District, BLM, held right-of-way application CA-13973 for rejection pending the submission by Bosley, within 30 days of receipt of the decision, of either a $ 9,000 deposit to cover the costs of preparation of an environmental analysis by BLM, or confirmation and a schedule of preparation of an environmental analysis by a qualified contractor. The District Manager also required Bosley to submit information regarding plans to interconnect his project site with the San Diego Gas and Electric Company (SDG&E) power system and "proof that this plan is acceptable to SDG&E." The Area Manager had earlier requested appellant, by letter dated July 5, 1983, to pay the $ 9,000 deposit and submit the required information "within 45 days" of receipt of the letter, or "we will no longer consider your application." In his August 1983 decision, the District Manager concluded that failure to comply with the decision "will result in rejection of your application without further notice, in the absence of an appeal." Bosley did not submit the deposit or the information. Instead, he filed an appeal, which was docketed as IBLA 84-146.

While the appeal was pending, BLM prepared an environmental assessment (EA) of the Table Mountain area to determine its suitability for wind energy development. Bosley and Westwind Electric, Inc. (Westwind), have appealed in part from a Final Record of Decision (FROD), CA-14633, of the District Manager, California Desert District, BLM, dated July 16, 1984. In the FROD, BLM held, based upon the findings set forth in the EA, that wind energy development was not appropriate for that portion of the Table Mountain

area north of Interstate Highway 8. 1/ The appeals from the FROD decision were docketed as IBLA 84-873. 2/

[1] Counsel for BLM argues that the August 1983 decision on appeal constitutes a final decision which rejected Bosley's application when he chose to file this appeal instead of submitting the money and the requested additional information (Answer at 3 n.4). Clearly it did not have that result.

The relevant paragraph in the August 1983 District Manager's decision reads:

> You are allowed 30 days from receipt of this decision in which to submit the required information with your payment or confirmation and schedule of EA preparation by a contractor. [3/] Failure to do so will result in rejection of your application without further notice, in the absence of an appeal.

1/ On Aug. 15, 1984, Westwind filed a notice of appeal from the FROD. Westwind stated: "The purpose of this correspondence is to notify you of my intention to appeal ROD CA-14633." Subsequently, on Sept. 14, 1984, Westwind filed another notice of appeal from the FROD, in which it stated that it was appealing "because there was not an adequate environmental assessment of the parcels identified in my application." Neither notice of appeal can be construed as constituting a statement of the reasons for Westwind's appeal, which was due "within 30 days after the notice of appeal was filed." 43 CFR 4.412(a). Failure to file a statement of reasons timely subjects an appeal to "summary dismissal." 43 CFR 4.402. Westwind has failed to file a statement of reasons or to explain its failure to do so. On Jan. 7, 1985, the Regional Solicitor, on behalf of BLM, moved to dismiss the appeal of Westwind for that reason. Accordingly, we hereby dismiss Westwind's appeal. See Village & City Council of Aleknagik, 77 IBLA 130 (1983). Moreover, the record indicates that Westwind's right-of-way application for wind energy development, CA-13080, was submitted with respect to the Table Mountain area "south" of Interstate Highway 8. Letter to Jerry Hull, California Wind Energy Systems, Inc., from Area Manager, El Centro Resource Area, BLM, dated July 5, 1983. That area was found to be "suitable for further consideration for wind energy development" (FROD at 7).

2/ Because both cases (IBLA 84-146 and 84-873) affect right-of-way applications for wind energy development within the Table Mountain area, we have, sua sponte, consolidated the cases for review.

3/ In the original call for applications published in the Federal Register on Apr. 8, 1983, BLM stated that it would prepare an "environmental document" assessing the environmental impacts of wind energy development in the Table Mountain area and that this document would be "funded in accordance with 43 CFR 2803.1[-1](a)(1)." 43 FR 15334 (Apr. 8, 1983). That regulation generally provides that a right-of-way applicant "shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. [§§]4321-4347), before the right-of-way grant * * * shall be issued." 43 CFR

Bosley's appeal from that decision was interlocutory in nature because the decision was an interim determination providing appellant an opportunity to cure perceived deficiencies in his right-of-way application prior to rejection of the application. Richard H. Greener, 79 IBLA 234 (1984); see Carl Gerard, 70 IBLA 343, 346 (1983). The BLM decision would not become a final decision until expiration of the 30-day period granted for compliance. Thus, Bosley's "notice of appeal," filed within 30 days of receipt of BLM's decision, should not have been treated as an "appeal." Rather, it should have been treated by BLM as a protest. See Randall J. Gerlach, 90 IBLA 338 (1986). BLM's failure to handle Bosley's "appeal" properly is of no consequence, however, because BLM's issuance of the FROD effectively rejected Bosley's right-of-way application and mooted the appeal in IBLA 84-146.

At page 5 of the FROD, the District Manager concluded that no wind energy development would be allowed in that portion of the Table Mountain area north of Interstate Highway 8 (which had been designated in the 1981 Eastern San Diego County Management Framework Plan as an Area of Critical Environmental Concern (ACEC)), including secs. 27, 34, and 35, T. 17 S., R. 8 E., San Bernardino Meridian, California, because wind energy development in that area "would create an 'adverse impact' on the cultural resources of the Table Mountain Archaeological District, as defined by 36 CFR 800.3(b)." 4/ As noted above this area includes the lands described in

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fn. 3 (continued)
2803.1-1(a)(1). In Smart & Co., 79 IBLA 323 (1984), we described the procedure followed by BLM with respect to the costs of the environmental analysis in processing various applications for rights-of-way to site wind turbine generators on public land in San Gorgonio Pass. The Board stated that, in accordance with 43 CFR 2801.1-1(a)(5), an applicant for a right-of-way must reimburse the United States for all the costs of processing the application before the applicant can be granted the right-of-way. The applicant must submit a nonreturnable processing fee with his application, based on the geographical extent of the right-of-way covered by the application. 43 CFR 2803.1-1(a)(3). The applicant must also pay the United States the amount of any processing costs that exceed this initial fee, whether or not the application is granted by BLM. 43 CFR 2803.1-1(a)(5) through (a)(7). Upon receipt of an application, BLM is to estimate the processing costs and, if these costs are expected to exceed the initial fee by an amount greater than the cost of maintaining actual cost records, BLM is to require payment of the excess before it incurs the costs. 43 CFR 2803.1-1(a)(4). When the processing costs incurred or expected to be incurred by BLM are not readily identifiable with one of two or more applications determined by the authorized officer to be in competition with one another, the agency is to allocate the costs among the applicants in equal shares. 43 CFR 2803.1-1(a)(10).

4/ The ACEC was designated in recognition of the area's outstanding cultural values (EA at 3). An ACEC is an area "where special management attention is required * * * to protect and prevent irreparable damage to important historic, cultural, or scenic values." 43 U.S.C. § 1702(a) (1982); see 43 CFR 1601.0-5(a) and 1610.7-2. The Table Mountain Archaeological District encompasses major portions of the ACEC and is "listed on the National Register of Historic Places" (EA at 3, 42). 30 CFR 800.36 sets forth those impacts to National Register properties which are considered "adverse effect[s]."

appellant Bosley's application. The District Manager stated that an action inconsistent with the terms of an ACEC designation or adversely impacting an ACEC-protected resource is not permitted "unless the Bureau determines that the public benefits of such an action outweigh the benefits of continuing the ACEC" (FROD, at 5). After weighing the value of cultural resources which were deemed to be "unique and irreplaceable" against the need for "non-polluting, renewable energy resources," the District Manager adopted the no wind energy development alternative for that area north of Interstate Highway 8 within the ACEC. Id. The District Manager noted the final EA had disclosed "no new information" which would justify altering or deleting the ACEC designation and the criteria for such designation were still valid:

> Criteria 1: The designation must still be relevant to the resource values. The area has been added to the National Register since designation as an ACEC. Scenic and wildlife resources are still undisturbed.
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> Criteria 2: The designation must still be important locally, regionally and nationally. The values are more important than they were in 1981. The resources are considered irreplaceable. This is supported by both the local and regional Native American Community and the San Diego County Planning Department.
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> Criteria 3: The designation must still be critical; that is, the designation must be necessary to prevent adverse impacts. At Table Mountain, this concerns the high potential for human impacts on the resource. The cultural resources on Table Mountain are fragile, sensitive, rare and irreplaceable. They are extremely vulnerable to impact because they are accessible and easily damaged. Special management remains necessary for protection.
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> Criteria 4: The designation must be protectible and enforceable. This requirement is of paramount consideration. If no development occurred, the ACEC could be protected due to its size, shape, location, physiography, configuration, limited adjacent uses, and lack of access. Only by maintaining these factors can the integrity of the ACEC be maintained. [Emphasis in original.]

Id. at 5-6. The District Manager stated the EA had disclosed that wind energy development (including the location of wind turbines, transmission lines, roads, and support facilities) would permanently affect the visual integrity of the area, i.e. the "character of the mountain," and damage Kumeyaay sacred values. Id. at 6. In addition, development would exceed "VRM [Visual Resource Management] Class II limits," and cause the loss of topsoil and vegetation due to erosion. Id.

Appellant argues that BLM's reasons for denying access to the Table Mountain area north of Interstate Highway 8 for wind energy development are without validity. Appellant contends BLM's analysis of the "pros and cons" of wind energy development fails to consider the local unemployed population which would benefit from development, as well as the SDG&E's and county planning director's support for wind energy development.

As to BLM's determination that wind energy development would adversely affect archaeological resources and Native American values, appellant contends the area of projected turbine placement has not and is not being used by Native Americans, because it is too windy. Appellant offers to reduce the number of wind turbines "to avoid all possible conflicts."

The FROD, at page 2, describes the cultural resources and Native American values found in that portion of the Table Mountain area within the ACEC as follows:

> Over 200 archaeological sites have been recorded in the area. The sites collectively represent an unparalleled concentration of prehistoric habitation and workshop locations. The area is archaeologically unique. The coincident occurrence of biotic and geologic factors ha[s] resulted in a remarkable archaeological record. There is no similar area in Southern California.
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> Table Mountain is also noteworthy because of its special significance for Native Americans due to shamanistic links to the mountain and the area's status as a focal point for use. During the DROD [Draft Record of Decision] review period, two governmental agencies charged with review responsibilities (the State Historic Preservation Office and the Advisory Council on Historic Preservation) indicated that the description of the existing environment and the possible effects of wind development in the FEA was complete, thorough, and well-developed. We, therefore, feel confident that these resource values are indeed highly significant and without controversy as to their validity.

[2] Approval of a right-of-way by the Secretary of the Interior pursuant to his authority under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), is a wholly discretionary matter. High Summit Oil and Gas, Inc., 84 IBLA 359, 92 I.D. 58 (1985); Nelbro Packing Co., 63 IBLA 176 (1982). A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by this Board if the record shows the decision to be based on a reasoned analysis of the factors involved, with due regard for the public interest. Id.

We conclude that the July 1984 FROD by the District Manager (based on the final EA) represents a reasoned analysis of the factors involved, including support for wind energy development, made with due regard for the public interest. In the FROD, at page 5, the District Manager recognized that declaring that portion of the Table Mountain area north of Interstate Highway 8 unsuitable for wind energy development will mean a "prime wind energy area will be unavailable for development." This represented a distinct change from the Draft Record of Decision at page 5, where the District Manager stated that there is a "relatively small amount of power which could be developed on Table Mountain." At the time of the FROD, the District Manager fully recognized the potential for wind energy development in the Table Mountain area. Nevertheless, he opted to protect the archaeological resources and Native American values of the area. This election was fully consistent with his obligation under section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (1982), to manage the public lands under the "principles of multiple use." See 43 U.S.C. § 1702(c) (1982).

Appellant argues that placement of his wind turbines will not adversely affect archaeological resources or Native American use of the Table Mountain area. Assuming that the archaeological resources are located at the base of Table Mountain and not along the ridge where appellant's turbines would be located, see EA at 33-38, appellant has failed to consider the impact of roads, transmission lines, and other support facilities leading to and surrounding the turbines upon those resources. Moreover, appellant fails to recognize the sacred importance attributed to the upper reaches of Table Mountain to the Kumeyaay culture, regardless of any use that may have been or will be made of that land. It is apparent from the EA that this land is not merely the location of Indian "spirits," but one of the focal points of the Kumeyaay religion. See EA at 45-7.

In section 1 of the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982), enacted August 11, 1978, Congress declared that it is the policy of the United States to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian." Section 2 of AIRFA, P.L. 95-341, 92 Stat. 470 (1978), states that the President shall direct Federal agencies to evaluate their policies and procedures "in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." In Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir), cert. denied, 104 S. Ct. 371 (1983), which involved a challenge by Native Americans to government-authorized development of the San Francisco Peaks, a mountainous area in Arizona which is regarded as sacred by certain Native American tribes, the court concluded that AIRFA "does not * * * declare the protection of Indian religions to be an overriding federal policy, or grant Indian religious practitioners a veto on agency action." The court stated:

> AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices. [Emphasis added.]

Id. at 747. However, in construing AIRFA, the court did not preclude an agency from considering the effect of agency action on Native American religious cultural rights and practices, and deciding to protect those rights and practices from proposed interference. This is what the District Manager did. Moreover, appellant has presented no evidence disputing the District Manager's conclusion that mitigation of wind energy development in a manner which would fully protect archaeological resources and Native American values is "not possible" (FROD, at 4).

Finally, Bosley has requested a hearing with respect to both appeals, pursuant to 43 CFR 4.415. We hereby deny those requests because appellant

has failed to identify a material factual issue which could affect the disposition of these appeals. See Desert Survivors, 80 IBLA 111 (1984); Alumina Development Corporation of Utah, 77 IBLA 366 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal filed by appellant Bosley from the August 1983 BLM decision is dismissed as moot, the July 1984 FROD of the District Manager, California Desert District, is affirmed and appellant's right-of-way application is rejected. The appeal filed by appellant Westwind is dismissed.

Gail M. Frazier
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Bruce R. Harris
Administrative Judge